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No. 85-573

In the Supreme Court of the United States

OCTOBER TERM, 1985

PUBLIC SERVICE COMPANY OF COLORADO, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner is exempt from the obligation imposed by Section 10(f) of the Federal Power Act, 16 U.S.C. 803(f), to pay the United States for the benefits petitioner receives from headwater improvements made by the United States that enhance the ability of one of petitioner's hydroelectric plants to produce energy.

2. Whether petitioner is required to reimburse the United States for the costs incurred by the Federal Energy Regulatory Commission to ascertain and fix the amount of petitioner's headwater benefit payment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 754 F.2d 1555. The orders of the Federal Energy Regulatory Commission (Pet. App. 1b-8b, 1c-4c, 1d-14d, 1e-2e) are reported at 18 F.E.R.C. ¶ 61,110, 20 F.E.R.C. ¶ 61,149, 25 F.E.R.C. ¶ 61,399, and 26 F.E.R.C. ¶ 61,896.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 1985, and a petition for rehearing was denied on June 4, 1985 (Pet. App. 1g). On August 21, 1985, Justice White extended the time within which to file a petition for a writ of certiorari to and including October 2, 1985, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In Part I of the Federal Power Act, 16 U.S.C. 792 *et seq.*, Congress established a comprehensive licensing and regulatory scheme to control the development and operation of hydroelectric projects on the navigable waters of the United States.[1] Under this Part of the Act, it is unlawful for any person to construct or operate any facility to generate electric power along, across or in any navigable waters of the United States, unless the operator has obtained a license from the Federal Energy Regulatory Commission (Commission) or holds a valid pre-1920 governmental permit. § 23(b), 16 U.S.C. 817.

The Act imposes a number of obligations on licensees and permittees, including the provision at issue here (§ 10(f), 16 U.S.C. 803(f)) relating to payment for headwater benefits. Headwater benefits are the benefits a hydroelectric project receives in the form of increased or more reliable energy production, as a result of the construction of improvements upstream (such as storage reservoirs) that regulate the flow of the river. As the Commission explained here, "regulated flow releases provide a more dependable stream flow by storing water during peak run-off periods to be released during drier months." Pet. App. 6b n.11. More dependable stream flows usually translate into more reliable, and increased, energy production for the downstream project.

Section 10(f) of the Act (set forth at Pet. App. 1h-2h) requires the Commission to determine both the amount of benefit received by the downstream project in the form of energy gains from the upstream regulation of the stream flow, and the amount of money the owner of the down-

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[1] The statute was first enacted in 1920 as the Federal Water Power Act, ch. 285, 41 Stat. 1063 *et seq.* In 1935, when Congress created a scheme for federal regulation of the distribution, sale, and operation of wholesale electric utilities (§§ 301-320, 16 U.S.C. 825-825r), the Federal Water Power Act became Part I of the Federal Power Act.

stream project should pay to the owner of the upstream project in return for these headwater benefits. Section 10(f) imposes the obligation equally upon the owner of licensed and unlicensed projects to pay for headwater benefits received from upstream improvements. Where the upstream project is built by the United States, the statute directs that the headwater benefit assessment is to be paid into a special fund to underwrite the construction, maintenance, and operation of headwater or other improvements on the navigable waters of the United States.

The basic obligation of licensees to pay for headwater benefits was established in the 1920 Federal Water Power Act. When the Act was amended in 1935 Congress extended the obligation to permittees as well, by adding a third paragraph to Section 10(f) at the request of the Federal Power Commission (the predecessor of the Federal Energy Regulatory Commission).[2] At that time, Congress also added a new last sentence to the first paragraph of Section 10(f), directing that the "licensees or permittees affected" are to pay to the United States the Commission's costs incurred to make the headwater benefit assessment.[3]

2. This case began in 1973 when the Commission's staff initiated an investigation of the headwater benefits in the Colorado River Basin. As part of that investigation, petitioner was asked to provide data concerning several of its hydroelectric projects. At the conclusion of the investigation, the staff notified the company that its Shoshone Plant, located along the Colorado River on federal lands in the White River National Forest, received sufficient energy gains from headwater improvements made by the

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[2] The responsibilities of the Federal Power Commission were transferred to the Federal Energy Regulatory Commission as of October 1, 1977, by the Department of Energy Organization Act, 42 U.S.C. 7101, 7172.

[3] The 1935 amendments were based on the agency's experience with the administration of the Act. See H.R. Rep. 1318, 74th Cong., 1st Sess 7 (1935); S. Rep. 621, 74th Cong., 1st Sess. 17 (1935).

Green Mountain Reservoir, a project of the Bureau of Reclamation on an upstream tributary of the Colorado River, to require the payment of headwater benefit charges. The Shoshone Plant was constructed in 1909 under the authority of a right-of-way permit from the Secretary of the Interior and continues to operate by virtue of that permit alone; it is not licensed under the Federal Power Act.[4] As a result of the staff finding, the Commission issued an order that required petitioner to pay for the headwater benefits it receives, and ordered a hearing to establish the exact amount to be paid (Pet. App. 1b-8b).

In response to petitioner's objections, still pressed in this Court, the Commission held that the fact that the Shoshone Plant operates under a pre-Federal Power Act permit did not preclude the assessment of headwater benefit charges because Section 10(f) of the Act provides for the assessment of such charges against both licensed and unlicensed projects (Pet. App. 2b). On rehearing, the Commission elaborated on its view that the 1901 Act, under which the Shoshone Plant permit was issued, did not preclude the assessment of headwater benefit charges, and that the Act's silence on that point could not be construed as waiving the government's right to assess such charges subsequently (Pet. App. 2c). The Commission concluded that neither of the two documents that govern the operation and maintenance of the Green Mountain Reservoir bars the assessment under Section 10(f) of headwater benefits charges (Pet. App. 2b-5b).[5] With respect to

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[4] Projects that predate the 1920 enactment of the Federal Power Act and operate under a valid pre-1920 permit are allowed to continue to operate without a license by Sections 23(a) and 23(b) of the Federal Power Act, 16 U.S.C. 816 and 817. It has been assumed throughout this litigation that the Shoshone Plant is operated under a valid pre-1920 right-of-way permit.

[5] The two documents are: (1) S. Doc. 80, 75th Cong., 1st Sess. (1937), which sets forth the plan for the development and operation of the Colorado-Big Thompson Project (including the Green Mountain

petitioner's claim that Colorado water law prohibits charges from headwater benefits, the Commission pointed out that state water law deals with proprietary interests in the water, while the assessments for headwater benefits are unrelated to such proprietary interests—they are benefits received in the form of energy gains from controlled flow releases (Pet. App. 5b-6b).

Petitioner sought review of the Commission's order in the United States Court of Appeals for the Tenth Circuit, but at the same time went forward with the administrative hearing to establish the amount of the headwater benefit the Commission had decreed it must pay. Eventually, petitioner entered into a stipulation with the Commission's staff establishing the amount petitioner will pay for headwater benefits and the Commission's investigative costs if it is found liable for such payments.[6]

Consequently, the only question presented in the administrative hearing was whether petitioner was obligated, under Section 10(f) of the Act, to reimburse the government for the Commission's investigative costs. The Administrative Law Judge held that the statute did not impose such an obligation on petitioner (Pet. App. 1f-11f), but the Commission reversed.

Reservoir) and was adopted by Congress when it appropriated funds for the project's construction (50 Stat. 595); and (2) a stipulation and judgment (the Blue River Decree) entered in litigation between a number of parties concerning the rights to the water that flows through the Colorado-Big Thompson Project. *United States* v. *Northern Colorado Water Conservancy District,* Civ. No. 2782 (D. Colo. Oct. 12, 1955). The Blue River Decree incorporates the provisions of S. Doc. 80. Congress approved the Blue River Decree in the Colorado River Storage Project Act § 11, 43 U.S.C. 620j. The decree accordingly has the force of a statute.

[6] Petitioner agreed to pay $400,000 plus interest for the headwater benefits received prior to January 1, 1971, $330,000 for the benefits received from January 1, 1971 through December 31, 1981, and $107,000 for the Commission's investigative costs (Pet. App. 4f).

The Commission has consistently interpreted the 1935 amendments to Section 10(f) to require all upstream and downstream licensees and permittees affected by an investigation to share the Commission's investigative costs equally. Where, as here, the United States is the owner of the upstream project, however, the Commission has required the downstream project owner to bear the full cost of the investigation, because it is the only licensee or permittee "affected" by the investigation. See Section 10(f); Pet. App. 7d-8d.

3. The court of appeals affirmed both Commission orders, relying in part on grounds different from the Commission's. It agreed with the Commission that neither petitioner's pre-Federal Power Act permit nor the terms of the 1901 Act under which it was issued barred the assessment of headwater benefit charges under Section 10(f) of the Federal Power Act (Pet. App. 12a-13a). However, the court below refused to accept the Commission's distinction between the company's proprietary interest in the water and the Federal Power Act's charge against the energy produced from that water (Pet. App. 18a). Instead, the Court looked to Colorado law and found that petitioner did not have a vested right under state law to an augmented stream flow, which was the benefit for which the court concluded the charges were being assessed (Pet. App. 13a-17a). On this basis, the court of appeals found no conflict between the headwater benefit charges and the petitioner's state-created water rights. It also found nothing in S. Doc. 80 that indicated a congressional intent to provide the Shoshone Plant with water from the Green Mountain Reservoir free of all charges, particularly headwater benefit charges (Pet. App. 18a-20a). Finally, the court followed prior judicial precedent, as well as the Commission's long-standing interpretation of the statute, and affirmed the Commission's assessment of investigative costs against petitioner.

ARGUMENT

Although the court of appeals departed in some measure from the Commission's reasoning, upon which we rely here, the conclusions that the court reached were correct and do not conflict with any decision of this Court or any other court of appeals.[7] The case poses no recurring issue of general concern; it involves issues that turn on an unusual combination of federal and state laws not likely to be repeated in other cases. Moreover, the petition relies (Pet. 11-16) on contentions concerning the meaning of Colorado law that the court of appeals rejected and that do not warrant this Court's review. There is, accordingly, no reason for further review.

1. a. Relying on *United States* v. *Colorado Power Co.*, 240 F. 217 (D. Colo. 1916), petitioner asserts that the terms of its pre-Federal Power Act permit, and the statute under which it was issued, preclude the assessment of headwater benefit charges under Section 10(f) of the Federal Power Act (Pet. 9-11). Petitioner significantly misperceives the holding of that case. Indeed, *Colorado Power Co.*, fully supports the Commission's assessment of headwater benefit charges here.

At issue in that case was the obligation of the permittee to pay charges assessed by the Secretary of the Interior that were based on the energy output of the Shoshone Plant. The permittee objected both to the Secretary's right to assess an annual charge and to the amount assessed, and refused to pay it. The government then attempted to revoke the permit and have the plant and related facilities removed from public land. The district court upheld the charge assessed by the Secretary and ordered the permittee to pay it. 240 F. at 222. Although the district court ex-

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[7] A prevailing party, of course, "may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted." *United States* v. *New York Telephone Co.*, 434 U.S. 157, 166 n.8 (1977)

pressed some reservations about the use of the "amount of electrical energy produced" by the permittee's plant as the basis for the assessment of the charge, it nevertheless concluded that "there is no present duty or purpose * * * to finally determine and adjudicate the limits of [the Secretary's] power in this regard"; in the absence of any proof that the amount assessed was "unreasonable and excessive, and more than necessary for the protection of [federal] rights * * * the manner in which it was fixed is not of present concern" (*id.* at 221).

Colorado Power Co. thus firmly established that the Shoshone Plant permittee had an obligation to pay the government annual charges, which (in the absence of any showing of unreasonableness) could be based on the energy output of the plant, much the way headwater benefit charges are assessed. Thus, far from precluding headwater benefit charges, that decision long ago established that the terms of petitioner's permit require the payment of such reasonable government charges. Petitioner is, in fact, in essentially the same position as the permittee in *South Carolina Electric & Gas Co.* v. *FPC*, 338 F.2d 898 (4th Cir. 1964), where the permit explicitly authorized the assessment of headwater benefit charges; this case was resolved by the Tenth Circuit consistently with that one. Petitioner is thus in error in asserting (Pet. 8, 10-11) that there is a conflict in the circuits.

b. Petitioner next argues that the federal laws here in issue were designed to protect its state created water rights, and that the assessment of a headwater benefit charge under Section 10(f) interferes with those vested rights (Pet. 11-16). This claim is entirely dependent on a contention concerning the meaning of state law that the court of appeals rejected. There is no reason in this case for this Court to depart from its normal practice of declining to undertake review of issues of state law.

Petitioner's contention, in any event, fails to distinguish between a proprietary right to the water and regulation of

the energy potential of the flowing stream. The distinction between a proprietary right to water, protected by Section 27 of the Federal Power Act, 16 U.S.C. 821, and state laws, and the regulation of the energy producing capability of the flowing water is fundamental to the regulatory scheme Congress enacted in Part I of the Federal Power Act. As this Court explained in *FPC* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 252 (1953):

> The references in the Act to preexisting water rights carry a natural implication that those rights are to survive, at least until taken over by purchase or otherwise. Riparian water rights, like other real property rights, are determined by state law. Title to them is acquired in conformity with that law. The Federal Water Power Act merely imposed upon their owners the additional obligation of using them in compliance with that Act.

While the Power Act "leaves to the States their traditional jurisdiction," in this instance the authority to establish rights to the water in the stream, it does so "subject to the admittedly superior right of the Federal Government, through Congress, to regulate interstate and foreign commerce." *First Iowa Hydroelectric Cooperative* v. *FPC*, 328 U.S. 152, 171 (1946).[8] This Court has also made clear that "[t]he Federal Government has domination over the water power inherent in the flowing stream * * *. The flow of a navigable stream is in no sense private property." *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 424 (1940).

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[8] As this Court has previously recognized, Congress in Part I of the Federal Power Act "drew upon its full authority under the Commerce Clause" (*FPC* v. *Union Electric Co.*, 381 U.S. 90, 96 (1960)), which is applicable because the development of the water power of navigable streams is "a by-product of the general use of the rivers for commerce." *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 426 (1940).

Thus, regardless of whether the court of appeals was correct in rejecting petitioner's claim as a matter of state law, state law could not, in any event, create a vested right in the power of the flowing stream; rather that is the precise focus of the Federal Power Act, particularly Section 10(f). Headwater benefit charges assessed under Section 10(f) are based on the increased energy produced from the flowing water as a result of upstream alterations of the stream flow. Hence, state water law, preserved by Section 27, is irrelevant to the assessment of headwater benefits under Section 10(f) and cannot form the basis for an exemption from the obligations of Section 10(f).

c. Petitioner errs in claiming that S. Doc. 80, which contains the congressionally approved terms for the operation of the Green Mountain Reservoir (the upstream project), exempts petitioner from headwater benefit charges. That document simply guarantees that the Shoshone Plant will continue to receive the amount of its vested appropriation of water without charge. It provides no basis for assuming that Congress, sub silentio, intended to waive the very different headwater benefit charges when it authorized the reservoir construction. It is well established that legislative grants of rights, powers, privileges, immunities or benefits are to be strictly construed. *United States* v. *Grand River Dam Authority,* 363 U.S. 229, 235 (1960); *Northern Pacific R.R.* v. *United States,* 330 U.S. 248, 257 (1947). Moreover, the assessment for headwater benefits is pursuant to a federal statute, Section 10(f) of the Federal Power Act, that is not even referred to in S. Doc. 80. The repeal of a statute by implication is disfavored. *Watt* v. *Alaska,* 451 U.S. 259, 273 (1981); *Morton* v. *Mancari,* 417 U.S. 535 (1974). Consequently, it would be inappropriate to assume, without basis in the language or legislative history of S. Doc. 80, that Congress intended when it approved that document to exempt petitioner from Section 10(f) of the Federal Power Act.

Nor are the provisions of S. Doc. 80 inconsistent with Section 10(f) of the Federal Power Act, since the purpose of each is different. The purpose of paragraphs (b) and (c) of S. Doc. 80 (quoted at Pet. App. 1j-3j) is to insure that water users on the western slope of the Colorado Continental Divide will not be deprived of an adequate water supply because of diversion of water to the eastern slope. In addition, although the Green Mountain Reservoir project was to be largely self-supporting, paragraph (c) makes clear that no charge is to be made for releasing water that would have gone to western slope users in the absence of the federal project. In other words, western slope users were not to pay for the right to *continue* to receive water that they would have received if the Green Mountain Reservoir had never been constructed. Section 10(f) of the Federal Power Act, on the other hand, is addressed to the *enhancement* of the power production potential of the water released in a regulated stream from the Green Mountain Reservoir. Its very different purpose is to insure that any *enhanced* production of downstream projects is not wholly subsidized by the upstream improvements.

2. Finally, petitioner attacks the Commission's long-standing interpretation of the language of Section 10(f), requiring the assessment of the Commission's investigative costs (Pet. 16-18).[9] Petitioner argues that the first para-

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[9] Section 10(f) provides in relevant part:

> [w]henever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. * * * The licensees or per-

graph of Section 10(f) refers exclusively to licensees, and that only the final paragraph deals with the obligation of permittees. Since the requirement to pay investigative costs appears in the first paragraph, and not in the final one, petitioner concludes that only licensees must pay such costs. Recognizing the legislative intent to create equal obligations for licensees and permittees, petitioner further narrows the scope of the statutory obligation to pay investigative costs by reading it as applying only to the owner of the upstream project, which benefits from the Commission's investigation because it receives the headwater benefit payments (Pet. 18 n.23).[10]

Petitioner's reading of Section 10(f) ignores the plain language of the first paragraph itself, which requires all "licensees or permittees affected" to pay the Commission's investigative costs. Congress could easily have limited the payment obligation to licensees only (although it is hard to imagine any policy that would justify it in doing so) or it could have required only those who benefitted from the investigation to pay its costs. Instead, it imposed that requirement on all licensees and permittees "affected" by the investigation. Petitioner is certainly an affected permittee; accordingly, the plain terms of the statute require it to bear costs of the investigation.

Even if petitioner's reading of the statutory language were a reasonable one, it would not prevail over the Com-

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mittees affected shall pay to the United States the cost of making such determination as fixed by the Commission.

* * * * *

Whenever any power project not under license is benefited by the construction work of a license or permittee, the United States or any agency thereof, the Commission * * * shall determine and fix a reasonable and equitable annual charge to be paid * * * on account of such benefits * * *.

[10] To the extent that this "benefits" argument recognizes that upstream permittees, as well as licensees, may be required to pay investigative costs, it is inconsistent with petitioner's primary argument that the first paragraph deals only with the obligations of licensees.

mission's alternative long-standing interpretation, which is also reasonable and consistent with congressional intent. See, *e.g.*, *American Paper Institute, Inc.* v. *American Electric Power Service,* 461 U.S. 402 (1983); *Ford Motor Credit Co.* v. *Milhollin,* 444 U.S. 555, 566 (1980); *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 315 (1933).

Both the last sentence of the first paragraph, requiring payment of the Commission's investigative costs, and the final paragraph, imposing the obligation to pay headwater benefits on permittees, were added in 1935 at the request of the Federal Power Commission. Since enactment, the Commission has consistently interpreted the statute to require investigative costs to be divided equally between the non-federal owners of the upstream and downstream projects involved in the investigation (Pet. App. 7d, 12d-13d). Where the upstream project is owned by the United States, the Commission has consistently charged all of its investigative costs to the owner of the downstream project, since that owner is then the only "licensee[] or permittee[] affected" by the investigation (Pet. App. 8d). The Commission's interpretation furthers the general purpose of Part I of the Act to recover all of the costs of administering that part of the statute from the private parties affected by the Act. § 10(e), 16 U.S.C. 803(e).[11]

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[11] See *Kokoszka* v. *Belford,* 417 U.S. 642, 650 (1974) (citation omitted) ("When 'interpreting a statute, the court will not look merely to a particular clause * * *, but will take in connection with it the whole statute * * * and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature.' ").

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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